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No. 94-179

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In the Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's motion to order the reopening of a National Labor Relations Board hearing two years after the conclusion of that hearing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

American Iron & Steel Inst. v. *EPA*, 560 F.2d 589 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978)	8
Brady v. *Maryland*, 373 U.S. 83 (1963)	11
Carrier Corp. v. *NLRB*, 768 F.2d 778 (6th Cir. 1985)	9
Centra, Inc., 314 N.L.R.B. No. 144 (Aug. 19, 1994)	7
Central States Southeast & Southwest Areas Pension Fund v. *Rogers*, No. 92-2435 (Dec. 16, 1993)	13
Demjanjuk v. *Petrovsky*, 10 F.3d 388 (6th Cir. 1993), cert. denied, No. 93-1875 (Oct. 3, 1994)	11
W.W. Grainger, Inc. v. *NLRB*, 860 F.2d 244 (7th Cir. 1988)	12
NLRB v. *Nueva Eng., Inc.*, 761 F.2d 961 (4th Cir. 1985)	11
Southern Maryland Hosp. Ctr., 288 N.L.R.B. 481 (1988).	11
Wisniewski v. *United States*, 353 U.S. 901 (1957)	11

Statutes and regulations:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:	
29 U.S.C. 1301(b)(1)	13
29 U.S.C. 1301(b)(2)	13
Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1381 *et seq.*	13

Statutes and regulations—Continued: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3, 4
§ 8(a)(3), 29 U.S.C. 158(a)(3) 3, 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 4
29 C.F.R.:
Section 102.118(b)(1) 10
Section 102.118(d) 10

Miscellaneous:

NLRB Casehandling Manual (Pt. 1) (June 1989) 10, 11

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OPINIONS BELOW

The order of the court of appeals denying petitioner's motion to set aside a previous settlement, to set aside enforcement of its previous order, and to grant rehearing (Pet. App. 83a) is not yet reported. The National Labor Relations Board's order denying petitioner's motion for a hearing de novo and to reopen the record (App., *infra*, 1a-5a) is not yet reported. The initial opinion of the court of appeals (Pet. App. 67a-81a) is reported at 954 F.2d 366. The decision and order of the National Labor Relations Board in the underlying unfair labor practice proceeding (Pet. App. 46a-65a), including the decision of

the administrative law judge (Pet. App. 2a-44a), is reported at 299 N.L.R.B. 658.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1992. The order of the court of appeals denying the motion to set aside the previous settlement, to set aside enforcement of its previous order, and to grant rehearing was entered on February 18, 1994. A petition for rehearing was denied on April 29, 1994. Pet. App. 85a. The petition for a writ of certiorari was filed on July 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In mid-1982, petitioners[1] received a contract from General Motors Corp. to consolidate freight at their trucking terminal in Cleveland, Ohio. Petitioners' dockworkers at that terminal were represented by Teamsters Local 407 and covered by the Teamsters National Master Freight Agreement (NMFA). To staff the General Motors job, petitioners hired dockworkers from D&S Leasing, Inc. (D&S), a personnel leasing company, whose dockworkers were represented by Teamsters Local 964 and covered by a "white paper" agreement which contained different contract terms from the NMFA. Pet. App. 5a, 48a & n.5.

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[1] Petitioners Central Transport, Inc. and Central Cartage Co. are wholly owned subsidiaries of petitioner Centra, Inc. Collectively, petitioners constitute a single employer within the meaning of the National Labor Relations Act. Pet. App. 4a & n.3. Central Transport, an over-the-road freight hauler, delivers goods to the Cleveland terminal, where Central Cartage dockworkers break down the shipments and consolidate them for local delivery. *Id.* at 48a.

In early 1986, petitioners decided to end their relationship with D&S and to have their own employees perform the consolidation work. Petitioners terminated their contract with D&S on Friday, May 31, 1986. The following Monday, June 2, 1986, petitioners resumed handling the General Motors freight with a crew of 50 dockworkers comprised of 26 former D&S employees and 24 new hires. Pet. App. 49a n.6, 50a, 52a & n.11. Petitioners refused to hire 33 former D&S employees, and treated the 26 former D&S employees whom they retained as "new" employees under the NMFA. As a result, beginning June 2, the 26 employees were paid approximately $2 per hour less than they had been receiving under the "white paper" agreement; these employees also lost seniority and health and welfare benefits accrued under that agreement. *Id.* at 50a, 51a.

2. On August 29, 1986, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that petitioners and D&S, acting as joint employers of the employees represented by Local 964, had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), (3), and (5). Pet. App. 2a. A hearing was thereupon held before an administrative law judge (ALJ), who found, *inter alia*, that petitioners and D&S were joint employers, and that they had violated Section 8(a)(1), (3), and (5) of the Act as charged. Pet. App. 2a-44a. On August 31, 1990, the Board issued a decision finding, in agreement with the ALJ, that petitioners had terminated their contract with D&S and refused to hire the 33 former D&S employees "as part of a plan to escape from [their] obligations under the ["white paper"] agreement." *Id.* at 51a. The Board held that petitioners' conduct violated Section 8(a)(1) and (3), in that it was "inherently destructive of these employees' rights

guaranteed under Section 7," and was motivated by anti-union animus. Pet. App. 51a. In light of this animus, the Board also held that petitioners violated Section 8(a)(1) and (5) by failing to bargain with Local 964 over the decision to terminate the D&S contract and the effects of that decision. Pet. App. 51a. The Board issued an appropriate remedial order. *Id.* at 59a-65a.[2] No remedy was imposed upon D&S, the Board's general counsel having stated at the start of the hearing that the Board had decided not to seek such a remedy against D&S. *Id.* at 38a n.43.

Of particular pertinence here, the Board, in concluding that petitioners violated the Act, specifically found that petitioners and D&S were "the joint employers of the dockmen who performed consolidation work for [petitioners] at the Cleveland facility and who were represented by Local 964." Pet. App. 49a. The Board explained (*ibid.*):

> Although D&S supplied the personnel to work at the Transport dock, it is clear from the record that Cartage supervisors directed the D&S personnel in their day-to-day activities. Bruce Morrison, Cartage's terminal manager, Jim Berquist, Cartage's operations manager, and Cartage's dock foremen Wayne Gentry and John Smith gave D&S

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[2] The order required petitioners, among other things, to reinstate and make whole the 33 former D&S employees who were refused employment, to restore retroactively the preexisting terms and conditions of employment that existed on May 31, 1986, and to remit all wages and benefits that would have been paid, absent petitioners' unilateral changes, from June 2, 1986 until petitioners negotiated in good faith or to impasse with Local 964 respecting the decision to terminate the D&S contract and the effects of that decision. Pet. App. 61a-62a.

> employees their work assignments, scheduled their working hours, approved requests for time off, and assigned men to train newly hired employees. In addition, Morrison testified that his approval was necessary before D&S could hire individuals to work at the dock and that he sometimes hired employees and placed them on the D&S payroll without consulting Rogers [president of D&S]. Morrison, Berquist, Gentry and Smith * * * also had the authority to discipline and terminate D&S personnel.

3. On January 17, 1992, the court of appeals issued a decision enforcing the Board's order. Pet. App. 67a-81a. The court found that the Board was entitled to summary affirmance of its factual determination that a joint employer relationship existed between petitioners and D&S because petitioners failed to challenge that finding on the merits. *Id.* at 74a n.2.[3] The court also found on the merits that substantial evidence supported the Board's joint employer finding. *Ibid.* Petitioners did not seek review of the court of appeals' decision in this Court.

4. On May 28, 1993, petitioners moved before the Board for either a hearing *de novo* or for reopening of the record. The basis for this motion, petitioners asserted, was that they had recently obtained information calling into question the credibility of Charles Garavaglia, a witness who had testified for the Board in the unfair labor practice proceeding. Petitioners asserted that they had learned that Garavaglia, who had

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[3] In the court of appeals, petitioners did not challenge the finding of a joint employer relationship, but instead argued that Local 964 was estopped from asserting such a relationship, and that Local 964 had waived its right to bargain. The court rejected both contentions. Pet. App. 74a-76a.

been petitioners' vice president for labor relations, had in fact also been a labor consultant for D&S; petitioners claimed that had the ALJ known that Garavaglia was, in effect, an agent of D&S, he would have discounted Garavaglia's testimony and, in particular, would not have found that petitioners and D&S were joint employers. App., *infra*, 2a-3a.

On September 20, 1993, the Board denied the petition. App., *infra*, 1a-5a. The Board held first that it lacked juris-diction to modify an order that had been enforced by a court of appeals. *Id.* at 3a-4a. The Board also rejected peti-tioners' argument on the merits. It explained:

> In essence, [petitioners] contend[] that Garavaglia was biased in favor of D & S because he was an agent of D & S and not of [petitioners]. However, [petitioners] ha[ve] shown, at most, that Garavaglia was an agent of D&S. [Petitioners] ha[ve] not contradicted the Board's finding that Garavaglia was also an agent of [petitioners]. Since Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument.

Id. at 4a.[4]

5. On January 5, 1994, petitioners filed a motion in the court of appeals seeking, among other things, a "remand" of the unfair labor practice proceeding to the Board on the joint employer issue. In that motion, petitioners again attacked Garavaglia's credibility on the basis of his business relationship with D&S. Petitioners also alleged that the Board's counsel at the hearing, Paul Lund, had relinquished its claim for money damages

[4] In view of the dual bases for the Board's action, petitioners mischaracterize the record in asserting (Pet. 5) that the Board declined to consider their motion on the merits.

against D&S in exchange for obtaining Garavaglia's testimony, and that the same counsel had subpoenaed Garavaglia to testify "at Garavaglia's own request to conceal from [petitioners] and its counsel that Garavaglia was clandestinely helping [counsel for the General Counsel] against [petitioners]."

On February 18, 1994, the court of appeals denied petitioners' motion in a summary order. Pet. App. 83a. On April 29, 1994, the court of appeals denied petitioners' petition for rehearing, again in a summary order. *Id.* at 85a.[5]

ARGUMENT

Petitioners claim (Pet. 6-24) that counsel for the Board acted improperly in not disclosing Garavaglia's relationship with D&S prior to the unfair labor practice hearing, and that the court of appeals erred in not ordering reopening of the hearing to allow the Board to reexamine its "joint employer" finding in light of the disclosure of that relationship. Petitioners' claim is without merit, and the order of the court of appeals

[5] To date, petitioners have not complied with any portion of the Board's order requiring the payment of money. On May 6, 1993, the Board's general counsel issued a compliance specification against petitioners, seeking backpay and contributions to the union's trust funds, as required by the Board's enforced order. At the opening of the compliance hearing, petitioners agreed to pay $5.53 million in backpay on or before December 31, 1993, thus leaving as the only issue for resolution the amount petitioners owed the union's trust funds. On December 20, 1993, the ALJ ordered petitioners to pay the trust funds approximately $1.3 million, and the Board adopted the ALJ's order. *Centra, Inc.*, 314 N.L.R.B. No. 144 (Aug. 19, 1994), slip op. 1, 2, 7. Petitioners subsequently reneged on their agreement to pay $5.53 million in backpay. On September 7, 1994, the Board authorized the General Counsel to initiate a civil contempt proceeding for recovery of that amount.

conflicts with the decisions of no other court of appeals. Review is thus not warranted.

1. The court of appeals' judgment enforcing the Board's order against petitioners became final approximately two years before petitioners' motion. Accordingly, petitioners' motion to the court of appeals was in effect a motion to recall the mandate which had issued in the enforcement proceeding before the court of appeals. Such a remedy is rarely granted, reflecting "the salutary principle that there should be an end to a controversy in litigation." *American Iron & Steel Inst.* v. *EPA*, 560 F.2d 589, 592 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978) (summarizing authority regarding motions to recall mandate). "All of the courts of appeals have emphasized that recall of a mandate is an extraordinary remedy, one to be used sparingly. * * * [E]xercise of the authority to alter a judgment falls within the *discretion* of the court, but * * * such discretion should be employed * * * only in unusual circumstances." 560 F.2d at 594.

2. As the denial of petitioners' motion by the court of appeals reflects, this case involves no such unusual circumstances. Petitioners contend (Pet. i, 22) that the hearing should have been reopened on the joint employer issue because petitioners were unable, due to several acts of alleged misconduct on the part of counsel for the Board, effectively to challenge Garavaglia's credibility through cross-examination in the unfair labor practice proceeding. Specifically, petitioners allege (Pet. 5) that "Garavaglia had met with the Board's counsel and had agreed to aid their [*sic*] case in return for the release of liability of D&S Leasing and had received a subpoena prior to the ALJ hearing to hide his complicity and further catch [petitioners] by surprise."

Petitioners' allegations of misconduct are groundless. To begin with, the Board's decision not to seek monetary liability against D&S, as Board counsel Lund explained to the ALJ at the start of the hearing, was a result of "the factual situation involved here." Tr. 7; Pet. App. 38a n.43. The record discloses two legitimate reasons for this decision. First, despite D&S's joint employer status with petitioners, the evidence did not establish that D&S participated in or instigated petitioners' scheme to evade their obligations to the employees represented by Local 964. Instead, as the Board found, it was petitioners who, motivated by antiunion animus, unlawfully terminated the personnel leasing contract with D&S, caused D&S to lay off the employees, and then refused to hire them, all as part of a wholesale scheme to evade the terms of the "white paper" agreement. Pet. App. 37a, 51a. Under these circumstances, it was proper for the Board's counsel to avoid holding D&S, an essentially innocent party, financially liable for violations committed by petitioners. See *Carrier Corp.* v. *NLRB*, 768 F.2d 778, 783 (6th Cir. 1985). Second, it would have served no useful purpose for the Board to have obtained a monetary judgment against D&S, as D&S had become defunct by the time of the hearing. Pet. App. 38a n.43. Petitioners' claim that monetary claims against D&S were dismissed by the Board in return for the Board's receiving favorable testimony from Garavaglia is without any foundation.[6]

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[6] Petitioners' assertion that their counsel at the hearing was "ambushed" by the announcement of the Board's decision not to seek damages from D&S (Pet. 15) is belied by the fact that petitioners' counsel at no point objected to this decision or sought an adjournment of the proceeding.

Also unavailing is petitioners' allegation (Pet. 5) that Garavaglia sought to be subpoenaed by the Board so as to create a misleading impression that he was testifying only because compelled to do so. The Board's established practice is to reimburse witnesses for travel, lodging, and meal expenses if they are subpoenaed by the General Counsel. NLRB Casehandling Manual (Pt. 1) Sec. 11780 (June 1989). In this case, Garavaglia resided near Detroit and the hearing was held in Cleveland. Hence, Garavaglia's request that he be subpoenaed ensured that he would be reimbursed for his travel and related expenses.

Finally, petitioners' contention that Board counsel Lund did not correct testimony of Garavaglia that he knew or should have known was false, and thereby perpetrated a "fraud" (Pet. 15-16), is likewise without merit. On cross-examination, Garavaglia was asked whether he had given an affidavit, statement, "or [any]thing of that sort" to the Board. Pet. 15. Such an affidavit or written statement would have been subject to disclosure to petitioners' counsel, see 29 C.F.R. 102.118(b)(1) and (d), whereas the substance of a conversation that is not memorialized would not. Garavaglia responded that he had given Lund no such statement. Pet. 15. Petitioners now assert (Pet. 16) that this answer was "a lie," and that Lund knew it to be such, for "Lund had indeed met with Garavaglia prior to the hearing in preparation of his case and in preparation of Garavaglia's testimony." Garavaglia's having met with Lund prior to his testimony, however, in no way establishes that Garavaglia had supplied the Board with either an affidavit or a written statement or that the Board was remiss in its disclosure obligations. Moreover, petitioners' counsel was hardly unaware that Lund had met with Garavaglia prior to the hearing: Garavaglia

was called as a witness by the Board, and it is common practice for lawyers to interview potential witnesses before deciding whether to call them to testify. See NLRB Casehandling Manual (Pt. 1) Sec. 10056.6 (June 1989) (providing that "[e]very attempt should be made to interview main representatives * * * of the charged party").[7]

Petitioners' claim that the Board's counsel committed misconduct is thus without foundation. Petitioners' related claim that the Board was obliged under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose Garavaglia's relationship with D&S (Pet. 6) is also baseless, for two reasons. First, the courts have uniformly held that *Brady* does not apply to Board proceedings which are civil in nature. *NLRB* v. *Nueva Eng., Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) (collecting cases).[8] Second, Gara-

[7] In fact, Lund had two brief telephone conversations with Garavaglia shortly before the hearing commenced before the ALJ on March 23, 1987. These conversations came after Garavaglia left petitioners' employ on April 8, 1986, approximately two months before the unfair labor practice charges in this case were filed. Tr. 25; Pet. App. 2a; Pet. 15. As a result, Lund was not required to give counsel for petitioners advance notice of these brief contacts. See *Southern Maryland Hosp. Ctr.*, 288 N.L.R.B. 481, 481 n.1 (1988).

[8] *Demjanjuk* v. *Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, No. 93-1875 (Oct. 3, 1994), on which petitioners rely for the contrary proposition (Pet. 6-7, 8, 13), is inapposite. *Demjanjuk* did not find the *Brady* rule applicable to Board proceedings, but only to "denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." 10 F.3d at 353. In any event, any conflict between the decision in this case and other decisions of the Sixth Circuit is a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957).

vaglia's relationship with D&S was simply not exculpatory evidence, as is required for a *Brady* obligation to be triggered. The Board charged D&S along with petitioners; any testimony rendered by Garavaglia to the effect that a joint employer relationship existed between petitioners and D&S tended if anything to implicate D&S in petitioners' unfair labor practices. Furthermore, as the Board noted in denying petitioners' motion, petitioners did not dispute that Garavaglia had served as their agent too, and "[s]ince Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument." App., *infra*, 4a.

3. In any event, the assembled record supplies no reason to believe that the joint employer issue would have been resolved differently had petitioners been aware of Garavaglia's relationship with D&S. As the Board noted in denying the motion to reopen the hearing, in the hearing itself petitioners adduced no evidence contradicting Garavaglia's testimony to the effect that a joint employer relationship existed. App., *infra*, 4a n.8. Indeed, as is reflected in the portion of the Board's decision finding that a joint employer relationship existed, Garavaglia's testimony was fully corroborated by the testimony of other witnesses whose credibility petitioners do not question. See Pet. App. 49a. Whether a joint employer relationship exists depends upon "such factors as the supervision of the employees' day to day activities, authority to hire or fire employees, promulgation of work rules and conditions of employment, work assignments, in issuance of operating instructions." Pet. App. 74a n.2 (quoting *W.W. Grainger, Inc* v. *NLRB*, 860 F.2d 244, 247 (7th Cir. 1988)). Here, Garavaglia testified (Pet. 3-4) that petitioners controlled the work assignments of D&S employees, approved and disapproved vacation requests, documented their work

performance and rules violations, and disciplined them without consulting with D&S. Other witnesses substantiated that testimony. Bruce Morrison, petitioners' own terminal manager, testified that his approval was necessary before D&S could hire individuals to work at petitioners' dock and that he sometimes hired employees and placed them on the D&S payroll without consulting George Rogers, D&S's president. Pet. App. 49a. Witnesses other than Garavaglia testified that petitioners assigned D&S employees work, scheduled their working hours, meted out discipline, approved and disapproved leave requests, and determined whether probationary employees would be hired on a permanent basis. Gov't C.A. Br. 6. Viewing the record as a whole, there was ample evidence to establish that petitioners and D&S were joint employers, wholly without regard to Garavaglia's testimony on the subject.[9]

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[9] Petitioners err in suggesting (Pet. 22 n.13) that the "unreliability" of Garavaglia's testimony is evidenced by an alleged inconsistency between the court of appeals' decision in this case and the same court's decision in *Central States Southeast & Southwest Areas Pension Fund* v. *Rogers*, No. 92-2435 (Dec. 16, 1993) (unpublished opinion). The court of appeals' decisions are not inconsistent. In *Rogers*, the court affirmed district court findings (1) that D&S and other entities constituted a "common control group," and, as such, were a "single employer" under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301(b)(1), and (2) that George Rogers, the sole shareholder of D&S, was personally liable for the common control group's withdrawal from the union's funds under ERISA and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. 1381 *et seq.* Petitioners' duty under the order in this case to make the victims of its unfair labor practices whole by, among other things, remitting unlawfully withheld contributions to the union's benefit funds (Pet. App. 62a) is an entirely separate

In sum, the court of appeals' decision not to grant the extraordinary remedy of ordering reopening of the unfair labor practices proceeding was amply justified. That decision conflicts with no other authority of which we are aware. There is thus no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

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matter from D&S's liability to those funds under ERISA and MPPAA.

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

D & S LEASING, INC; CENTRAL
TRANSPORT, INC., AND CENTRAL
CARTAGE COMPANY

Case 8-CA-19212

and

ARCHER BAILEY III, AN INDIVIDUAL

D & S LEASING, INC., CENTRAL
TRANSPORT, INC., AND CENTRAL
CARTAGE COMPANY

Case 8-CA-19282

and

TEAMSTERS LOCAL UNION NO. 964,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO

and

TRUCK DRIVERS UNION LOCAL 407,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
AFL-CIO
PARTY OF INTEREST

ORDER DENYING MOTION

On August 31, 1990, a three-member panel of the National Labor Relations Board issued its Decision and Order[1] in which it found, inter alia, that the Respondent[2] and D & S, a personnel leasing firm, were joint employers and that the Respondent violated Section 8(a)(3) by causing the layoff of and refusing to recall employees jointly employed by the Respondent and D & S at the Respondent's Cleveland terminal. In finding the violation, the Board agreed with the judge's conclusion that the Respondent's termination of the employees and its refusal to rehire some of them were actions "inherently destructive" of the employees' Section 7 rights within the meaning of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967). As part of the remedy for the unfair labor practices found, the Board ordered the Respondent to offer 33 named employees immediate and full reinstatement and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's discrimination against them. On January 17, 1992, the United States Court of Appeals for the Sixth Circuit enforced the Board's Order.[3]

On May 6, 1993, Region 8, on behalf of the General Counsel, issued a Compliance Specification and Notice of Hearing. On May 28, 1993, the Respondent filed a petition for a hearing de novo, or, in the

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[1] 299 NLRB 658 (1990).

[2] The "Respondent" denotes collectively Central Transport, Central Cartage, and Centra, Inc., which the Board found to be a single employer.

[3] 954 F.2d 366.

alternative, a motion to reopen the record. The General Counsel filed a brief in opposition and a brief in response and the Respondent filed a reply brief. Thereafter, the Respondent filed a "supplemental exhibit" to its petition. The General Counsel filed a brief in response and the Respondent filed a reply brief.

In its petition, the Respondent contends that Charles Garavaglia, the Respondent's vice president for labor relations at all times relevant, was in fact "the Labor Consultant for D & S Leasing at all times pertinent hereto."[4] The Respondent asserts that Garavaglia was an agent of D & S at the time of the unfair labor practices.[5] Additionally, the Respondent contends that if the judge had known that Garavaglia was, in effect, an agent of D & S at all times relevant, he would not have relied on Garavaglia's testimony and therefore would not have found that the Respondent and D & S were joint employers or that the Respondent engaged in inherently destructive conduct in terminating and refusing to rehire the employees at issue.

As an initial matter, we find that it would be inappropriate for the Board to reconsider these

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[4] In support of its contention, the Respondent relies on an August 17, 1986 letter signed by D & S president George Rogers which states, inter alia, that Charles Garavaglia of C & G Consultants was Rogers' "representative" at the time.

[5] D & S and Local 507 (replaced by Local 964 in late 1982) entered into a collective-bargaining agreement in mid-1982. The parties renewed the contract in 1985. In May 1986, the Respondent caused D & S to layoff the empoyees at issue and refused to rehire them, conduct which, as noted above, the Board found to be inherently destructive of the employees' Section 7 rights. The Respondent dismissed Garavaglia in April 1986.

issues because the Board no longer possesses jurisdiction to modify the Order in this case. In this regard, we observe that the Board has stated that it lacks jurisdiction to modify an order once it has been enforced, as here, by a United States circuit court of appeals.[6] Further, even assuming that we possess jurisdiction, we would find the Respondent's petition lacking in merit. In essence, the Respondent contends that Garavaglia was biased in favor of D & S because he was an agent of D & S and not of the Respondent. However, the Respondent has shown, at most, that Garavaglia was an agent of D & S. The Respondent has not contradicted the Board's finding that Garavaglia was also an agent of the Respondent.[7] Since Garavaglia was, at most, an agent of both, we fail to see the relevance of the bias argument.[8]

IT IS HEREBY ORDERED that the Respondent's petition for hearing de novo, or, in the alternative, motion to reopen the record, is denied.

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[6] See *Royal Typewriter Co.*, 239 NLRB 1, 2 (1978), and *Dependable Tile Co.*, 229 NLRB 1034 (1989). See also *NLRB v. Mastro Plastic Corp.*, 261 F.2d 147, 148 (2d Cir. 1958).

[7] 299 NLRB 658.

[8] We note that in the underlying proceeding the Respondent failed to present evidence contradicting Garavaglia's testimony or to assert that Garavaglia was acting outside the scope of his authority.

Dated, Washington, D.C., September 20, 1993.

/s/ JAMES M. STEPHENS
James M. Stephens, Chairman

/s/ Dennis M. Devaney
Dennis M. Devaney, Member

/s/ John Neil Raudabaugh
John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD